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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE

IN THE MATTER OF

CHRISTIAN RYAN ROMERO

A person under 18 years of age

) Case No JV 2008-065

) **STATE'S REPLY IN SUPPORT OF ITS
MOTION TO DISMISS**

) (Assigned to the Honorable Michael Roca,
Judge *Pro Tem*)

The State of Arizona, by and through undersigned counsel, hereby submits its
reply in support of its motion to dismiss without prejudice filed November 21, 2008

The juvenile argues concepts involving pre-indictment delay in support of its
request the charge be dismissed *with* prejudice. The concepts of pre-indictment delay
will not arise until, and unless, the State refiles the dismissed charges. Even if the
concepts of pre-indictment delay did apply to the requested dismissal, they do not
require a dismissal with prejudice as the juvenile cannot show any actual prejudice or
that his right to a fair trial will be prejudiced if the charges are re-filed at a later date.


Furthermore, the State's motion to dismiss is *without* prejudice, and it would
withdraw any motion to dismiss if the court were to impose a dismissal *with* prejudice.

The attached Memorandum of Points and Authorities supports the State's motion
to dismiss.

RESPECTFULLY SUBMITTED this 26th day of November, 2008

CRISS E CANDELARIA
APACHE COUNTY ATTORNEY

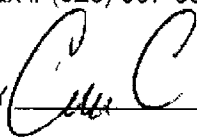
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BY 
Criss E. Candelaria
Bradley W. Carlyon

The original filed with the
Clerk of the Superior
Court and a copy delivered
this ____ day of November
2008 to

The Honorable Michael Roca
Apache County Superior Court
Judge *Pro Tem*

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2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. INTRODUCTION.**

4 The Arizona Juvenile Rules of Procedure do not have any specific rules
5 governing dismissal of counts contained in a delinquency petition. In the absence of
6 guidance from the Arizona Juvenile Rules of Procedure, Arizona law suggests that we
7 turn to the Arizona Criminal Rules of Procedure. "The application of [adult criminal]
8 rules to juveniles charged with the commission of an offense is premised upon concepts
9 of due process, equal protection, and fairness and not upon a belief that the rules
10 governing prosecution of adults should apply. The Rules of Criminal Procedure only
11 serve as a familiar vehicle to achieve due process ends. Maricopa County Juv. Actions
12 No. JV-119590 and JV-118201, 167 Ariz. 591, 593, 810 P.2d 589, 591 (App. 1991).
13 Under Rule 16.6(a), Arizona Rules of Criminal Procedure, the State may dismiss a
14 charge "at any time upon finding that the purpose of the dismissal is not to avoid the
15 provision of Rule 8."

16 The juvenile does not allege in his response that the State is seeking the
17 dismissal of one count to circumvent the speedy adjudicatory hearing rights that were
18 triggered at the time of the advisory hearing. Furthermore, the State avows to the Court
19 that the reason for the dismissal has nothing to do with the speedy trial rights.

20 The arguments presented by the juvenile and the cases he cites to support his
21 argument have nothing to do with dismissal of a delinquency petition or counts
22 contained therein. Rather, the juvenile bases his argument on concepts associated with
23 pre-indictment delay.

24 The State does not believe that the issue of pre-indictment delay is legally ripe
25 for consideration by the Court at the point of dismissal of a count. The issue would only
26 arise if at some future date the State were to re-file the count. However, the state will
27 address the issues raised by the juvenile in his response.

28 **II. PRE-INDICTMENT DELAY.**

1 The seminal case on pre-indictment delay is *United States v. Marion*, 404 U.S.
2 307 (1971). *Marion* stated

3
4 [T]he Due Process Clause of the Fifth Amendment would require
5 dismissal of the indictment if it were shown at trial that the premeditated
6 delay caused substantial prejudice to appellee's rights to a fair trial
and that the delay was an intentional device to gain tactical advantage
over the accused

7 *Id.* At 324 (emphasis added). Arizona has adopted this two-prong test for pre-
8 indictment delay. See, e.g., *State v. Torres*, 116 Ariz. 377, 569 P.2d 807 (1977), *State*
9 *v. Hall*, 129 Ariz. 589, 592-93, 633 P.2d 398, 401-02 (1981).

10
11 **A. Dismissal is Not Made For the Purpose of Gaining an Unfair Tactical
12 Advantage Over the Juvenile.**

13 Any action taken by parties during the course of litigation are for tactical
14 advantage, and are hoped to prejudice the opposing party by achieving an advantage.
15 In a criminal prosecution, the filing of sentencing enhancement allegations are arguably
16 for tactical advantage. Similarly, filing motions *in limine* to introduce or preclude
17 evidence is done for tactical advantage. In its broadest sense, the dismissal of the
18 count and the possibility that it may be re-filed in the future can be considered an act for
tactical advantage.

19 However, the use of the phrase "tactical advantage" in cases involving pre-
20 indictment delay takes on a very specific and narrow meaning. The prejudice that the
21 Courts require for a showing of pre-indictment delay is much higher and very specific.

22
23 [T]he Due Process Clause of the Fifth Amendment would require
24 dismissal of the indictment if it were shown at trial that the pre-indictment
delay caused substantial prejudice to appellee's *rights to a fair trial*.

25 *Marion*, 404 U.S. at 324 (emphasis added). In short, the prejudice must relate to the
26 defendant's ability to prepare his case for trial. Without a showing of lost evidence,
27 faded memories, or other factors which prejudice the defendant's opportunity for a fair
28

1 trial, the doctrine of pre-indictment delay is inapplicable. A delay is only unjustified
2 under the doctrine if

3 [T]he delay, when balanced against the prosecution's reasons for it,
4 offends those "fundamental conceptions of justice which lie at the base of
our civil and political institutions."

5 *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (quoting *Mooney v. Holohan*, 294
6 U.S. 103, 112 (1935)). In other words, the concept of pre-indictment delay is
7 inapplicable unless the State has delayed the case in "bad faith." See
8 *United States v. Foxman*, 87 F.3d 1220 (11th Cir. 1996), see also *State v. Petzoldt*, 172
9 Ariz. 272, 278, 836 P.2d 982, 988 (Ct. App. 1991) (defendant must show the delay in
10 and of itself was intended to obtain an *unfair* advantage over the defendant").

11 In this case, the prosecution avows that the dismissal is not intended to obtain an
12 unfair prejudice or tactical advantage over the juvenile. Rather, it is due to our Judicial
13 system being poorly equipped to handle a case of this nature involving an 8 year old. It
14 is done to ensure that the juvenile and the two murder victims in this case do not fall
15 through the cracks in the system that might occur if both charges remain in the pending
16 delinquency petition.

17 As the defense has pointed out in its Supplement to Objection to Motion to
18 Dismiss, there is a possibility that the juvenile could be found incompetent in this case.
19 Were that to happen, the Court's options are limited. If the juvenile is deemed to be
20 restorable to competency, it must order the juvenile to undergo efforts to restore him to
21 competency. See A.R.S. 8-291.08(C). If the juvenile is found incompetent and not
22 restorable to competency within two-hundred forty days, the court is required to dismiss
23 the matter with prejudice and initiate civil commitment proceedings if appropriate. The
24 court would also be allowed to appoint a guardian ad litem to initiate a dependency
25 investigation. See A.R.S. 8-291.08(D).

26 The problem with civil commitment proceedings is that only in rare instances
27 does a juvenile suffer from a "mental disorder" which would make proceedings under
28 Title 36 of the Arizona Code appropriate. See A.R.S. 36-501(22). If the juvenile is found

1 incompetent due to his age alone, he will most certainly not fit the definition of a
2 mentally disordered person, and no treatment will be available for him under the civil
3 commitment statutes

4 Likewise Arizona's child dependency system is ill-equipped to handle this case
5 The dependency system is not set up to handle cases where the issue is the placement
6 of a child based on behavioral issues It is geared to evaluating the fitness of a parent
7 to care for a "normal" child In this case, the biological mother appears to be capable of
8 parenting a normal child However, the juvenile in this case may not fit the description
9 of a "normal" child

10 As civil commitment is unlikely, and the dependency involving this juvenile has
11 already been dismissed, there is a substantial likelihood that in the event the juvenile
12 were found incompetent and not restorable to competency, the juvenile in this case will
13 go completely without treatment to address why he was capable of killing two
14 apparently innocent persons Further, the victims in this matter would go completely
15 without justice

16 Our juvenile justice system is geared to children 12 and above but makes
17 allowance to file petitions against children as young as 8 years of age However, if the
18 court were to find the child incompetent because he cannot fully understand the
19 proceedings against him due solely on his age, the charges could be dismissed with
20 prejudice or be precluded from re-filing in the juvenile court due to the time limits set
21 forth in Rule 25(B), Arizona Rules of Procedure for Juvenile Court (but would not
22 preclude the re-filing of the charges in adult court) Such a result denies the victims and
23 public of any sense of justice for these heinous murders It also denies the juvenile the
24 rehabilitative services that he apparently needs to both deal with why he was capable of
25 committing these murders and to assist him with the grief and remorse that he is
26 probably feeling

27 It is not the state's desire to persecute this juvenile Rather, it is the desire and
28 intent to find a balance between the purpose of the juvenile justice system -- to

1 rehabilitate juveniles – and bring a sense of justice to the victims and the public, all the
2 while taking into consideration the juvenile's tender age To this effect, the state has
3 tendered a plea offer to the juvenile's attorneys that would resolve all the charges in the
4 juvenile court contingent upon the results of the mental health evaluations

5 As the Court can see, the State's objectives in dismissing one of the two counts
6 is not designed to offend the "fundamental conceptions of justice which lie at the base of
7 our civil and political institutions" Rather, the motion is designed to ensure that the
8 juvenile eventually receives the treatment that he desperately needs, and that the
9 victims in this case receive some type of justice This does not impose the type of
10 "tactical disadvantage" that the pre-indictment delay doctrine prohibits There is no "bad
11 faith" on the part of the State

12 **B. No Prejudice Denying the Juvenile a Fair Trial.**

13 The second component of a request for dismissal based on pre-indictment delay
14 is prejudice The juvenile tries to argue that he would be prejudiced by this dismissal of
15 the count because it could, in the future, be refiled in adult court Therefore, his
16 jeopardy for his acts is expanded The logic underlying this argument is specious at
17 best Using this argument a juvenile or adult defendant is prejudiced any time a motion
18 to enhance a sentence is filed because it expands the defendant's potential jeopardy It
19 could even be argued under this logic that the filing of a juvenile delinquency petition
20 prejudices the defendant because it puts the juvenile at risk for jeopardy for his
21 delinquent conduct

22 The juvenile has not, and at this point can not, articulate how the dismissal of one
23 count will impair his ability to prepare a defense The fact of the matter is that the
24 juvenile will continue to prepare for his defense of the remaining count in the
25 delinquency petition that will carry over into his preparation of the remaining charge if it
26 were to be re-filed Moreover, the juvenile could re-raise this issue at the time the
27 dismissed charge was re-filed if they could point to actual prejudice at that time

1 Without a showing of actual prejudice that affects the juvenile's right to a fair trial,
2 the juvenile also fails the second prong of the *Manon* test

3 **III. CONCLUSION.**

4 The issue of pre-indictment delay is not applicable to the State's proposed
5 dismissal of one of the counts in the delinquency petition without prejudice. In the first
6 place, the defense motion is not ripe for consideration by the Court. Even if the
7 doctrine prohibiting pre-indictment delay could be invoked by the defendant at this point,
8 the juvenile has not shown that it would apply. The juvenile has failed to demonstrate
9 how any inappropriate tactical advantage has been gained by the State. Likewise, the
10 Juvenile has failed to demonstrate that the dismissal without prejudice would prejudice
11 his right to a fair trial at a later time.

12 Therefore, the court should grant the State's request to dismiss the count *without*
13 prejudice.

14 DATED this 26th day of November, 2008

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